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**Via Facsimile (703) 602-0350**

October 12, 2005

Defense Acquisition Regulations Council  
Attn.: Ms. Amy Williams  
OUSD (AT&L) DPAP (DAR)  
IMD 3C132  
3062 Defense Pentagon  
Washington, DC 20301-3062

RE: Notice of Proposed Rulemaking [DFARS Case 2004-D010]  
Defense Federal Acquisition Regulation Supplement;  
Export-Controlled Information and Technology

Dear Ms. Williams:

I write on behalf of Cornell University ("Cornell") to express concerns regarding the proposed DFARS amendment announced in the Notice of Proposed Rulemaking published in the July 12, 2005 Federal Register ("Notice"). The Notice proposes to establish a new DFARS Subpart 204.73 and an associated contract clause for inclusion in Department of Defense ("DoD")-funded research contracts. We appreciate this opportunity to offer comments concerning the proposed changes to the DFARS and urge the DoD to consider our concerns.

Cornell also supports and endorses the comments submitted by the Association of American Universities and the Council on Governmental Relations.

**I. The Proposed Rule is Premature.**

We believe that the proposed rule is premature because the Department of Commerce Bureau of Industry and Security ("BIS") is still considering comments received in response to its Advanced Notice of Proposed Rulemaking (ANPR; RIN 0694-AD29 Fed.Reg. March 8, 2005) concerning the correct interpretation of the

definitions of "deemed export" and "use technology" as they apply to equipment used in fundamental research on university campuses. More broadly, the university and business communities are engaged in an ongoing dialogue with governmental representatives, concerning the recommendations made by the Department of Commerce Office of the Inspector General ("OIG") last year regarding proposed changes to the Export Administration Regulations ("EAR") and their interpretations. Given that the Commerce Department administers the Export Administration Regulations (EAR) and the State Department administers the International Traffic in Arms Regulations ("ITAR"), DoD should await their guidance on the definitive interpretation of regulatory provisions that are presently the subject of considerable controversy before attempting to draft associated contract provisions.

Cornell's comments in this proceeding and its assessment of the impact of the proposed DoD rule will be substantially affected by how BIS responds to comments filed in its pending rulemaking. It is important that we be allowed an opportunity to comment on the rule proposed by DoD after BIS issues its own final rule on deemed exports. Therefore, Cornell urges DoD to delay any further action on its proposed rule until BIS issues its final rule.

II. The Proposed Rule Would Have a Detrimental Impact on University-based Research.

A. Economic Impact

Although the notice states that the requirements contained in the proposed rule are merely "clarifications of existing responsibilities" and are not expected to have a significant economic impact on regulated research institutions, the proposed amendments would, in fact, impose new requirements, and force many institutions to create new programs and to alter dramatically their current operations. The proposed DRARS subpart 204.73 would impose new requirements (e.g., training programs and badging) in circumstances where they would not be required under existing law. While a few universities have controlled facilities on campus, most do not. The costs of purchasing, installing and implementing sophisticated security for laboratory rooms, creating the infrastructure needed to manage user access, and administering, training, compliance, and audit programs would have a greater economic impact than that acknowledged in the Notice.

This regulatory change would greatly increase the cost of doing research by those institutions that elect to continue doing research under this regime. Research universities could not afford these costs without federal support or a significant reallocation of existing scarce research dollars from the actual research to this administrative undertaking.

Of greater significance, the proposed change would also diminish the pool of research institutions available to conduct such research. If required by the DFARS to establish segregated facilities, many universities will decline to do DoD research because such restrictions are antithetical to their fundamental educational philosophy.

The history of the phenomenally successful and productive field of academic research in the United States establishes that, an open, collaborative and international research environment, and a free exchange of ideas among diverse researchers are essential to fundamental scientific and engineering discoveries. The net effect of the proposed changes would be to make crucial areas of research unattractive and to distort research priorities. Discouraging universities from conducting DoD-funded research could adversely affect national security.

#### B. Fundamental Research

Neither the Notice nor the proposed DFARS language makes any reference to the fundamental research exemption, see 15 CFR §734.8, and 22 CFR §120.11. This omission could have the undesirable, and, presumably, unintended effect of restricting the availability of the fundamental research exemption in connection with university research.

If the proposed DFARS 204.73 language were adopted without explicit recognition of this exclusion from export controls and licensing requirements, DoD would be imposing export controls, as a matter of contract, when the applicable export regulations would not impose such controls.

The failure to expressly recognize the fundamental research exemption will, at best, create ambiguity that will lead to protracted contract negotiations, delays in research, and overbroad application of export controls. The extensive time delays (often weeks and months) to negotiate acceptable language would themselves have a substantial negative impact on the research and the researchers. Clarity on these points is essential in order to assure that agreements may be negotiated in a mutually acceptable and timely manner and that the research enterprise not be impacted by needless bureaucratic restrictions.

There needs to be an explicit recognition that any export compliance requirement imposed in the DFARS is subject to the applicability of all exclusions recognized in the export regulations, including the one for fundamental research. This is best achieved by building recognition of these exclusions into the definition of "Export-controlled information and technology." See proposed alternate language in Appendix A.

### III. The Imprecise Wording of the Proposed Contract Clause Will Result in Over-regulation.

#### A. Use of the Word "may."

The proposed DFARS language directs DoD contract officers to use the new clauses in solicitations and contracts that may involve the use of generation of export-controlled information or technology. The likely result is that virtually all contracts and subcontract will contain the new language. Insecurity on the part of funding agencies will likely cause them to exercise an excess of caution and include controls as part of standard contract terms without realizing the profound implications -- the resultant evisceration of fundamental research exemption.

This concern is not unfounded. We are already seeing this over-reaction manifested in standard contract language for basic research agreements that would impose publication restrictions and restrict the participation of foreign nationals. Institutions across the country have become increasingly concerned about the inclusion of problematic and inappropriate clauses in research agreements. Over the past few years, universities across the country have reported a significant increase of situations where a sponsor has included award language that either restricts the dissemination of research results or the use of foreign nationals without prior approval on certain research projects. Institutions have reported the inclusion in proposed contracts of DFARS 252.204-7000 clause more often than any other single restriction. This concern is heightened by the "Catch 22," that acceptance of restrictions on dissemination and participation can, in and of itself, cause research that would otherwise qualify as fundamental to lose that exemption. Institutions would then be required to apply for and obtain export licenses from the State Department or Commerce Department.

In considering a change to the DFARS language, it is essential to recognize that a delicate balance needs to be struck between the long-proven benefits of openness in research and the need for security. Great harm could be done by erring on the side of over-inclusiveness. The proposed regulations include no check to prevent excessive movement in the direction of restriction on research. Greater specificity is needed. Sweeping and/or indefinite statements are counterproductive.

#### B. Flow-down Provision

The problematic tendency toward over-inclusiveness is compounded by use of "may" again in the flow-down provision. The blanket requirement that the new requirements be passed down to subcontractors where research "may" involve export-

controlled information or technology would impose new requirements on universities even where no export-controlled information or technology is required in the performance of that subcontract. We recommend the final regulations make clear that the new export compliance clauses do not have to be passed down to subcontractors when restricted technology is not needed for that particular piece of the overall project or when the funding to the subcontractor is for fundamental research. Specific revisions to the DFARS clause are proposed below in Appendix A. Moreover, compliance programs, when appropriate, should only apply in the specific areas utilizing export-controlled information or technology and not be required on an institution-wide basis.

The proposed rule prescribes an extensive list of specific mechanisms to control access to export-controlled information and technology. These requirements go beyond the requirements under the National Industrial Security Program Operating Manual for the handling of classified material--which provides for badging, and segregated work areas as appropriate, rather than imposing a blanket requirement. Cornell urges DoD to preserve the flexibility afforded universities under applicable export laws and regulations as to the means of achieving compliance.

#### IV. The Proposed DFAR Language is Inconsistent With NSDD 189.

National Security Decision Directive ("NSDD") 189 provides that the only appropriate mechanism for government control of information generated through federally-funded research is the classification system.

NSDD 189 states in pertinent part:

"... our leadership position in science and technology is an essential element in our economic and physical security. The strength of American science requires a research environment conducive to creativity, an environment in which the free exchange of ideas is a vital component.

...

It is the policy of this Administration that, to the maximum extent possible, the products of fundamental research remain unrestricted. It is also the policy of this Administration that, where the national security requires control, the mechanism for control of information generated during federally funded fundamental research in science, technology and engineering at colleges, universities and laboratories is classification.

...

No restriction may be placed upon the conduct or reporting of federally funded fundamental research

that has not received national security classification, except as provided in applicable U.S. Statutes.  
(emphasis added).

The Bush Administration reaffirmed NSDD 189, in a November 1, 2001 letter written by Condoleezza Rice. In that letter, Dr. Rice stated:

"On behalf of the President, I would like to respond ... The key to maintaining U.S. technological preeminence is to encourage open and collaborative basic research. The linkage between the free exchange of ideas and scientific innovation, prosperity, and U.S. national security is undeniable."

The proposed addition to DFARS 252.204-7000 is inconsistent with NSDD 189.

The proposal is also inconsistent with DoD Instruction 5230.27. Section 4.3 which states:

"The mechanism for control of information generated by DoD-funded contracted fundamental research in science, technology and engineering performed under contract or grant at colleges, universities, and non-government laboratories is security classification. No other type of control is authorized unless required by law."

The controls proposed in the Notice are not required by law.

The adverse effects on university research and, consequently, on the nation's leadership position in scientific innovation, are outlined in greater detail in the comments that Cornell submitted to BIS in response to its March 8<sup>th</sup> ANPR. Those comments are available at [http://www.osp.cornell.edu/Compliance/Export/Cornell\\_Export\\_Controls%20CommentLtr\\_6-24-05.pdf](http://www.osp.cornell.edu/Compliance/Export/Cornell_Export_Controls%20CommentLtr_6-24-05.pdf).

In brief:

- Fundamental research is critically important to the prosperity and security of this country. With the growing dependence on technology, the need for unfettered fundamental research has become more compelling.

- Institutions of higher education, and the fields of science and engineering, in particular, rely heavily on the participation of foreign nationals in conducting fundamental research. See also Public Policy (COSDEPUP), *Policy Implications of International Graduate Students and Postdoctoral Scholars in the United States* (May 2005; available at: <http://www.nap.edu/books/0309096138/html/>).



•The environment for international scholars has already been seriously harmed by a mood of suspicion and by bureaucratic delays in the issuance of visas. Any further tightening of the rules affecting foreign nationals in the U.S. could discourage them from working at U.S. institutions.

See also the White Paper entitled Security Controls on the Access of Foreign Scientists and Engineers to the United States which can be found at [http://www.csis.org/hs/051005\\_whitepaper.pdf](http://www.csis.org/hs/051005_whitepaper.pdf).

V. Inadequate Justification for the Proposed Changes Has Been Provided

The proposed expansion of export-related requirements to the conduct of university research has not been sufficiently justified and could have serious, negative impacts. The proposed changes would unnecessarily erect barriers to conducting fundamental research. Existing safeguards can adequately address the concerns.

We have seen no evidence that existing visa and classification processes fail to adequately address concerns about the potential for transfer of any sensitive technologies at universities.

The solution to the need for technology-specific controls lies in the long-proven approach of classification on national security grounds whereby access is limited to individuals with appropriate security clearances. And, as discussed above, use of classification is the official policy of this country.

The visa system addresses security concerns related to individuals. The visa process is intended to carefully screen foreign individuals and to assess their threat to national security before approving their entry into the United States. Visa applications are investigated thoroughly by federal agencies, including the Departments of State and Homeland Security. If, after extensive background screening of a foreign student or researcher, our government approves the individual's entry, that individual should be permitted to join fully in the academic research community of the university.

We request that DoD not act precipitously or in a manner that could have a severe negative impact on higher education when the existing regulatory framework for issuing visas and classifying information can adequately address the concerns raised in the Notice.

In conclusion, higher education has been, and remains, committed to doing its part to preserve national security. We submit these comments to assist DoD in addressing legitimate security concerns without seriously and unnecessarily compromising scientific research at American universities. In light of the competing interests that need to be delicately balanced in forging national policy in this area, we urge that any expansion of export restrictions and requirements should be accomplished through changes to the export regulations themselves and not via contract.

Thank you for the opportunity to comment.

Very truly yours,

Patricia A. McClary  
Associate University Counsel  
Cornell University  
Ithaca, NY

PAM:cmw



## **APPENDIX A**

### **Suggested Revisions to Proposed DFARS Language:**

The following revisions to the proposed DFARS Subpart 204.73 offered by Cornell are intended to achieve the following:

1) make it clear that the requirements regarding access controls on export-controlled information and technology would not apply if the research were covered by an exception or exclusion recognized in the export regulations (EAR or ITAR), such as that for fundamental research.

2) make it clear that the requirements apply only to specific work to be performed under a given DoD contract and do not impose University-wide obligations.

3) require that the need for export-controlled information and technology in order to perform the work under a given contract be determined at the outset so that universities can make informed decisions about whether they are willing, and able, to participate.

4) require "flow-down" of the clause only where export-controlled information and technology is required for a subcontract and, conversely, prohibit inclusion of the clause where export-controlled information and technology is not required.

5) make it clear that the identification of export controlled information and technology is made within the limits of the EAR and ITAR and that DoD will not be making independent classification and jurisdictional determinations.

6) preserve flexibility afforded under existing law in the specific means and methods of achieving compliance with the export regulations.

In the editorial suggestions below, new language is underlined. Language to be deleted is bracketed and shaded.

### **204.7304 Contract clause.**

Use the clause at 252.204-70XX, Requirements Regarding Access to Export-Controlled Information and Technology, in solicitations and contracts for—

- (a) Research and development; or
- (b) Services or supplies

that [may involve the use or generation] require the transfer of export-controlled information and technology.

**252.204-70XX Requirements Regarding Access to Export-Controlled Information and Technology**

(a) Definition. Export-controlled information and technology, as used in this clause, means information and technology that may only be released to foreign nationals or foreign persons under licenses issued pursuant to [in accordance with] the Export Administration Regulations (15 CFR parts 730-774) and the International Traffic in Arms Regulations (22 CFR parts 120-130), respectively. Export-controlled information and technology does not include information excluded or exempted from control under the applicable regulations, including, but not limited to, information that is publicly available or that arises out of or results from fundamental research.

(b) In order to perform [performing] this contract, the Contractor [may] will be required to gain access to export-controlled information or technology. DoD will identify all such controlled information or technology.

(c) The Contractor shall comply with all applicable laws and regulations regarding export-controlled information and technology received in the performance of work under this contract, including registration [in accordance with] if required by the International Traffic in Arms Regulations.

(d) The Contractor shall maintain an [effective] export compliance program, to the extent required by the EAR or ITAR, with respect to export-controlled information and technology received in the performance of work under this contract. [The program must include adequate controls over physical, visual, and electronic access to export-controlled information and technology to ensure that access by foreign firms and individuals is restricted as required by applicable Federal laws, Executive orders, and regulations.]

[(1) The access control plan shall include unique badging requirements for foreign nationals and foreign persons and segregated work areas for export-controlled information and technology.]

(2) The Contractor shall not allow access by foreign nationals or foreign persons to export-controlled information and technology without obtaining an export license, other authorization, or exemption required under the EAR or ITAR.

[(e) The Contractor shall—

- (1) Conduct initial and periodic training on export compliance controls for those employees who have access to export-controlled information and technology; and
- (2) Perform periodic assessments to ensure full compliance with Federal export laws and regulations.]

(f) Nothing in the terms of this contract is intended to change, supersede, or waive any of the requirements of applicable Federal laws, Executive orders, and regulations, including but not limited to—

- (1) The Export Administration Act of 1979 (50 U.S.C. App. 2401 as extended by Executive Order 13222);
- (2) The Arms Export Control Act of 1976 (22 U.S.C. 2751);
- (3) The Export Administration Regulations (15 CFR parts 730-774);
- (4) The International Traffic in Arms Regulations (22 CFR parts 120-130);
- (5) DoD Directive 2040.2, International Transfers of Technology, Goods, Services, and Munitions;
- (6) DoD Industrial Security Regulation (DoD 5220.22-R);
- (7) National Security Decision Directive 189 (NSDD-189);
- (8) National Industrial Security Program Operating Manual (NISPOM) (DoD 5220.22-M); and
- (9) DoD Instruction 5230.27.

(g) The Contractor shall include the substance of this clause, including this paragraph (g), in all subcontracts and only those subcontracts for—

- (1) Research and development; or
- (2) Services or supplies

that require the transfer [may involve the use or generation] of export-controlled information or technology.